No. 12,389

In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, and M. W. MOUAT as Administrator of the Estate of May Paula Mouat, deceased,

Appellees,

MOTION TO DISMISS APPEAL OF RECONSTRUCTION FINANCE CORPORATION AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

APPEARANCES:

THOMAS C. COLTON,
Billings, Montana;
H. L. MAURY,
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Butte, Montana,
Attorneys for appellant, Mouat.

A. DEVITT VANECH,
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Washington, D. C.,
Attorneys for Reconstruction Finance Corporation.

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Appellees.

MOTION TO DISMISS THE APPEAL OF APPELLANT RECONSTRUCTION FINANCE CORPORATION, A CORPORATION

Comes now M. W. Mouat, M. W. Mouat as Trustee, substituted for May Paula Mouat, as Trustee of an express trust, and M. W. Mouat, as Administrator of the Estate of May Paula Mouat, deceased, and moves this Honorable Court to dismiss the appeal of appellant, Reconstruction Finance Corporation, a corporation, filed on August 9th, 1949, 403 R., on the ground, and for the

reason that this Court lacks jurisdiction of said appeal, in that said appeal is premature, as the judgment appealed from was not a final judgment when said appeal was taken, in that:

(a) Judgment was entered June 11, 1949, 391 R.-397 R.

(b) Appellees, Mouats, moved to make additional Findings of Fact, which Motion was filed June 18, 1949, 397 R.-399 R.

(c) Appellant, Reconstruction Finance Corporation, moved to re-open final judgment, and to take additional testimony, which motion was filed July 20, 1949. 399 R.-402 R.

(d) Minute Entry of hearing appellees Mouats' Motion to make additional Findings of Fact, and of hearing appellant, Reconstruction Finance Corporation's Motion to Re-open Final Judgment, and to take additional testimony. 415 R.-416 R.

(e) Order denying appellees Mouats' Motion to make additional Findings of Fact entered November 7, 1949. 418 R.

(f) Order denying appellant Reconstruction Finance Corporation's Motion to re-open final judgment, and to take additional testimony, entered November 7, 1949. 417 R.

Therefore, when Reconstruction Finance Corporation, appellant, filed its Notice of Appeal on August 9th, 1949, there was then pending before the District Court, appellees Mouats' timely Motion to make additional Findings of Fact, which under Rule 73 (a) of the Federal Rules of

Civil Procedure, terminated the running of the time for appeal, regardless of whether or not an alteration of the judgment would be required if the motion was granted.

This motion is made and based on the transcript of the record on file herein.

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,
Attorneys for appellees,
Mouats.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE APPEAL OF RECONSTRUCTION FINANCE CORPORATION, A CORPORATION

STATEMENT OF FACTS

Judgment was entered herein on June 11, 1949, 391 R.-397 R., and within ten days thereafter, June 18, 1949, as provided by Rule 52 (b) of the Federal Rules of Civil Procedure, appellees, Mouats, served and filed their Motion requesting the Court to make additional Findings of Fact, 397 R.-399 R. This motion was denied on November 7, 1949. 418 R.

Appellant, Reconstruction Finance Corporation, on July 20, 1949, served and filed its motion to re-open the final judgment and to take additional testimony. 399 R.-402 R.

Both motions were argued, in open court, by counsel for the respective parties on September 27, 1949, and each of the parties were granted time within which to file briefs in support of their motions, and upon the filing of briefs, the motions were to be considered as submitted. 415 R.-416 R. Appellant, Reconstruction Finance Corporation's motion was denied on November 7, 1949. 417 R. During the pendency of both motions, and on August 19, 1949, appellant, Reconstruction Finance Corporation, flied its Notice of Appeal to this Court. 403 R.

ARGUMENT

The effect of the Motion, under Rule 52 (b) of the Federal Rules of Civil Procedure, to amend or supplement the Findings of Fact is to toll the period during which an appeal may be taken from a final judgment. Fiske v. Wallace, (8th Cir.) 115 Fed. (2nd) 1003; Zimmern v. United States, 298 U. S., 167, 80 L. Ed. 1118, 56 S. Ct. 706, and, whether so stated to be, is actually a motion to amend the judgment if such course should pursue the amended Findings of Fact.

Appellees Mouats having exercised their right to move for additional Findings of Fact, within time, and before the appeal was taken by Reconstruction Finance Corporation, preserved jurisdiction in the District Court, and the time for taking the appeal was extended until the Court decided the motion. Fiske v. Wallace (8th Cir.), 115 Fed. (2nd), 1003, 1004. This reasoning is undoubtedly based on the theory that the judgment was not final while a motion, in time and before appeal, was pending. Kingman v. Western Mnfg. Co., 170 U. S. 675, 42 L. Ed. 1192, 18 S. Ct. 786. The rule requires that the judgment, to be appealable, should be final, not only as to all of the parties, but as to the whole subject matter, and as to all of the causes of action involved. Collins v. Miller, 252 U. S. 364; 64 L. Ed. 616, 619; Louisiana Nav. Co. v. Oyster Comm., 226 U. S. 99, 101; 57 L. Ed. 138-140; 33 Sup. Ct. 78; Sheppy v. Stevens, 200 Fed. 946.

Appellees, Mouats', motion to make additional Findings of Fact, was timely. It was filed within ten days as provided by Rule 52 (b) FRCP.

Rule 73 (a) FRCP provides * * * "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run, and is to be computed, from the entry of any of the following orders made upon a timely motion under such rules * * * or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted * * *."

Subdivision (a) of Rule 73, FRCP was amended in 1946, and among other amendments, there were inserted in said rule the words: "Whether or not an alteration of the judgment would be required if the motion is granted."

The notes of the Advisory Committee on the Amendments to the Rules contains the following:

> "Now suppose a timely motion to amend the findings under Rule 52 (b) is made, but the desired amendment deals only with purely formal or mechanical matters upon which findings have been made and the motion, if granted, would not require an alteration of the judgment. In Leishman vs. Associated Wholesale Electric Co. (1943), 318 U. S. 203, 63 S. Ct. 543, 87 L. Ed. 714, the Supreme Court stated that a motion to amend and supplement the 'findings of fact in more than purely formal or mechanical aspects tolls the appeal statute, and * * * the time for taking an appeal runs from the date of the order disposing of the motion.' Hence, an appeal taken before disposition of such a motion, is premature. United States v. Crescent Amusement Co., (1944) 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160. Since the motion in the Leishman case involved matters that were more than purely formal or mechanical, the Court did not have to deal with the effect of a

motion involving only such matters. But due to difficulty in distinguishing between what is substantial and what is purely formal or mechanical, and because the motion under Rule 52(b) must be made not later than 10 days after the entry of the judgment, Rule 73(a) states specifically that the full time for appeal to a court of appeals runs from entry of the order granting or denying a timely motion under Rule 52(b) to amend or make additional findings of fact, 'Whether or not an alteration of the judgment would be required if the motion is granted.' While it cannot be said with certainty that this principle, which may be said to involve an extension of the Leishman doctrine, would be applicable to extend the time for a direct appeal, it is believed that the principle should be applicable to a direct appeal in the interest of uniformity and for the reasons that prompted the Committee to recommend and the Court to promulgate the provision in Rule 73(a)."

Moore's Federaal Rules as amended, 1939, 1946, 1948, with comments on the amendments, page 1201.

"If the motion is *timely* made the full time for appeal commences to run anew and is to be computed from the entry or an order granting or denying a motion under Rule 50(b), 52(b), and 59(e); and from an order denying a motion for a new trial under Rule 59(b). If the court grants a motion for a new trial made by a party under Rule 59(b), or grants a new trial on its own initiative under Rule 59(d) then there is, of course, no judgment to appeal from, and the time for appeal does not commence to run until the entry of a new judgment following the new trial.

"As pointed out in the Comment to Rule 72, supra, the Leishman case recognized that a motion to amend or make additional findings of fact in more than purely formal or mechanical aspects tolls the running of the time for appeal. Since it is difficult to distinguish between a motion raising only formal or

> mechanical matters and one going to substance, and since the motion under Rule 52(b) to be timely must be made within the ten day period, Rule 73(a) in the interest of certainty provides that the motion under Rule 52(b) tolls the running of the appeal time 'whether or not an alteration of the judgment would be required if the motion is granted'. This provision then goes beyond and settles a matter not expressly decided in the Leishman case."
>
> Moore's Federal Rules as amended, 1939, 1946, 1948, with comments on amendments, page 1201.

The 1946 amendments do three things:

(1) Prescribe the time within which an appeal to a Court of Appeals may be taken that, in general, is shorter than formerly prevailed;

(2) Prescribe the effect upon the appeal time of the making of certain motions that affect the finality of a judgment; and,

(3) Allow the dismissal of an appeal by the District Court under certain circumstances, where the appeal has not yet been docketed with the Court of Appeals.

These three matters are discussed in detail in the notes of the Advisory Committee on Amendments, and will be found in Moore's Federal Rules, as amended, 1939, 1946, 1948, with comments on the amendments at page 1206-1214.

Leishman vs. Associated Wholesale Electric Co., 318 U. S. 203, 87 L. Ed. 714, 63 Sup. Ct. 543, was decided February 15, 1943, and United States vs. Crescent Amusement Co., 323 U. S. 173, 89 L. Ed. 160, 65 Sup. Ct. 254, was decided December 11, 1944, so that we believe the

amendment to Rule 73(a) "Whether or not an alteration of the judgment would be required if the motion is granted," goes beyond and settles a matter not expressly decided in either the Leishman case, supra, or the Crescent Amusement Company case, supra, because the 1946 amendment was made after both of these cases were decided. The rule is now so broadened that finality cannot be given to the judgment until the motions designated in Rule 73(a) are disposed of.

Unquestionably the general rule is that the time for taking an appeal is suspended by a seasonably filed motion under Rule 50(b), 52(b) or Rule 59 as provided in Rule 73(a) F. R. C. P.

Morse vs. United States, 270 U. S. 151, 154, 46 S. Ct. 241, 242, 70 L. Ed. 518; Safeway Stores vs. Coe (D. C.) 136 Fed. (2nd) 771, 774.

"Rules of practice and procedure are devised to promote the ends of justice and should be liberally construed, but the courts have repeatedly held that an appeal is granted to the losing party on condition that he complies with the statute permitting an appeal; that an appellant must be held to have known of the existence of the statute; and that the requirements of the statute are jurisdictional and cannot be avoided." Ray, et al., v. Morris, et al., (7th Cir.) 170 Fed. (2nd) 498, 499; citing Mosier vs. Federal Reserve Bank of New York (2nd) Cir.) 132 Fed. (2nd) 710. Since the question is one of jurisdiction, this Court must proceed to consider it, even though there be no moving party.

Continental Casualty Co. vs. United States (9th Cir.) 167 Fed. (2nd) 107, 108.

We pass the question of the right of appellant, Reconstruction Finance Corporation, to file its Motion under Rule 60(b) FRCP "to re-open the judgment and to take additional testimony," for the reason that the judgment was not a final judgment, as required by the rule, while appellees, Mouats', Motion "to make additional Findings of Fact," filed within time, was pending and undisposed of.

We respectfully submit that appellees, Mouats', Motion to make additional Findings of Fact was filed within time, and terminated the running of the time for appeal until the Motion was disposed of, and that any appeal taken, by either party, during the pendency of appellees, Mouats', Motion was premature, as the judgment was not a final judgment until the appellees, Mouats', Motion was decided.

We submit that this Court lacks jurisdiction of the appeal herein by appellant, Reconstruction Finance Corporation, and, therefore, this Motion should be granted, and appellant, Reconstruction Finance Corporation's appeal to this Court should be dismissed.

Respectfully submitted,

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,
Attorneys for Mouats.

APPENDIX

RULE 52
FINDINGS BY THE COURT

b. AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 73
APPEAL TO A COURT OF APPEALS

a. WHEN AND HOW TAKEN. When an appeal is permitted by law from a District Court to a Court of Appeals, the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party, the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment, the District Court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original

time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules; granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59 * * *."

Service of the above and foregoing Motion to Dismiss and Points and Authorities in support thereof, are hereby acknowledged, and copy thereof received this..... day of February, 1950.

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Appellant,

By:.....

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Attorneys for appellant.